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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 18, 2001

VIA FIRST CLASS MAIL & FACSIMILE [(202) 418.2824]

RM-9913

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II
445 12th Street, SW
Suite TW-A325
Washington, D.C. 20554

Re: ***In the Matter of ARCOS-1 USA, Inc. and COM TECH INTERNATIONAL CABLE CORPORATION; PEER's Request for Environmental Assessment and Enforcement Actions and Request for Emergency Administrative Injunction i.c.o. Sunny Isles, FL (25 55' 50" N. 80 07' 00" W.)***

Dear Ms. Salas,

Enclosed for filing in the above referenced docket are an original and two (2) copies of PEER's *Amended Request for Environmental Assessment*. Enclosed also is a third copy which we respectfully request the Commission date-stamp and return in the enclosed, self-addressed envelope.

Should you have any questions, please contact the undersigned at (202) 265.7337.

Very respectfully,

Daniel P. Meyer, Esq.
General Counsel and its Attorney

Attachments

No. of Copies rec'd 0+4
List A B C D E

cc: Rebecca Arbogast, Esq., Chief, Telecommunications Division, International Bureau, Federal Communications Commission, Washington, D.C. 20554

Kathleen Collins, Esq., Attorney Advisor, International Bureau, Federal Communications Commission, Washington, D.C. 20554

Troy F. Tanner, Swidler Berlin Shereff Friedman, LLP, The Washington Harbour, 3000 K Street, NW — Suite 300, Washington, D.C. 20007-5116

Before the

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
ARCOS-1 USA, INC. and	)	
COM TECH INTERNATIONAL CABLE	)	File No. _____
CORPORATION	)	
	)	Dkt. No. RM - 9913
PUBLIC EMPLOYEES FOR ENVIRONMENTAL	)	
RESPONSIBILITY'S Request for	)	
Environmental Assessment and Enforcement Actions	)	
and Request for Emergency Administrative Injunction	)	
i.c.o. Sunny Isles, FL (25 55' 50" N. 80 07' 00" W.)	)	

To the Bureau Chief, International Bureau

AMENDED REQUEST FOR EMERGENCY ADMINISTRATIVE INJUNCTION OF PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (PEER)

Pursuant to the Commission's NEPA Reservation rule, Public Employees for Environmental Responsibility ("PEER") requests that the Commission reopen the record in the case of ARCOS-1's Sunny Isles application[1] to provide for environmental analysis sufficient to meet the Commission's obligations under the National Environmental Policy Act of 1969, 42 U.S.C. § 432 *et seq.* PEER's filings of January 26, 2001 and February 2, 2001 are hereby incorporated into this *Amended Request for Emergency Administration Injunction.* PEER also requests that documents submitted into this record be concurrently filed in the PEER Petition rulemaking proceeding under Dkt. No. RM-9913. In addition, PEER requests that the formal caption for this proceeding be fixed as is presented, *supra.*

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[1] ARCOS-1 USA, Inc., File No. SCL-LIC-19981222-00032, Cable Landing License (DA 99-1312)(released July 2, 1999)("the Cable Landing License").

As construction of station facilities will begin on February 20th, PEER repeats its request for an *Emergency Administrative Injunction* to prevent the Commission from violating the National Environmental Policy Act of 1969. 47 U.S.C. § 4332(2)(C).

In order to comply with the National Environmental Policy Act of 1969 under the Submarine Cable Laying categorical exception established in the 1970s, the FCC reserves the right to require licensees to file an environmental assessment ("EA") or an environmental impact statement ("ES") should the cognizant Bureau determine that the landing of a cable and/or the construction of associated stations would significantly affect the environment. *See* 47 C.F.R. § 1.1307. *See, e.g.,* Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan, *Cable Landing License* (File No. SCL-LIC-19981117-00025), 14 FCC Rcd 13066, 13083 (1999), at ¶ 45(7). The reservation language used in the template for Paragraph 45, and other similarly constructed paragraphs, places the language in the future conditional. Up until the point at which the environment is actually damaged under the license, the FCC reserves it right to require an EA or an EIS.

With respect to ARCOS-1's *Motion in Opposition of Request for Environmental Assessment and Enforcement Actions and Request for Emergency Administrative Injunction* (February 15, 2001)("Motion in Opposition"), PEER incorporates the following into its *Request for an Emergency Administrative Injunction,* dated February 2, 2001.

To wit:

1. Timeliness. Regarding ARCOS-1's allegation of timeliness, or lack thereof, PEER politely demurs. Motion in Opposition at 2, 3. PEER concurs with learned counsel for ARCOS-1 that private administrative procedural rights are extinguished at the end of the twenty-eighth (28th) day following the issuing of the *Public Notice to File Comments* regarding a specific submarine cable landing application. *See, e.g.*, Non-Streamlined International Applications Accepted for Filing, *Public Notice*, Report No. TEL-00262NS (released July 21, 2000). What the opposition fails to

understand is that the successful exercise of private administrative procedural rights are not a precondition to Commission decision-making in this instance. Rather, the Commission must assert its prerogative under the NEPA Reservation rule in order to ensure that it — the Federal Communications Commission — is not in violation of the National Environmental Policy Act of 1969. ARCOS-1 may well be in full compliance with the Commission's rules and, indeed, PEER may have no private administrative procedural rights. But that in no way repeals the act of Congress requiring the Commission to act when notified that the potential for environmental damage has been identified and will, in all probability, take place.

Rather than review this case under the private administrative procedural rights rubric, PEER advises the Commission that once ARCOS-1 accepted a license to federal largess (in this case, permission from the sovereign to land on a coast), ARCOS-1 was required to amend that license should there be a change in any material fact upon which that license was predicated. 47 C.F.R §§ 1.17, 1.52, 1.65. As the license was predicated on no adverse impact or effect on the environment, any review in a peer jurisdiction — such as the State of Florida — which indicates an adverse impact or effect would require an amendment to the application for that license, and subsequently, Commission review and action upon that new information. If ARCOS-1 did not amend its application with an EA following its understanding that an adverse impact or effect would take place, then ARCOS-1 one has violated both Section 1.65 of the Commission's rules and the False Statements Act of 1934. While it is the Commission's prerogative whether to seek a criminal complaint regarding such potential falsifications, PEER strongly suggests that until the Commission takes its role in meeting the mandates of the NEPA seriously, industry will continue to humor the Emperor has he parades in his new clothes. If the Commission is being intentionally mislead, it ought to seek the enforcement provided by both the *Code or Federal Regulations* and the *United States Code*.

2. Categorical exception. Regarding ARCOS-1's allegation that submarine cable laying is subject to a categorical exception, PEER empathizes and politely demurs. Motion in Opposition at 2, 4. *See* 40 C.F.R. § 1506.5(a)("If an agency requires an applicant to submit environmental

information for possible use by the agency . . . then the agency should assist the applicant by outlining the types of information required.") A categorical exception which exists even though adverse impacts and effects are being forced on the coral ecosystems is a legal fiction. *Compare* 40 C.F.R. § 1508.4 (". . . a category of actions which do not individually or cumulatively have a significant effect . . .") with 40 C.F.R 1508.27(b)(1)(3)(5)(". . . [i]mpacts which may be both beneficial and adverse . . . .[U]nique characteristics of the geographic area . . . . degree to which the possible effects on the human environment are highly uncertain . . . ."). It is a convenient device by which we say there is no adverse effect, even though we know there is an adverse effect. *Compare* 47 C.F.R. § 1.1306(a) n.1 *with* Motion in Opposition at 7-9. When that legal fiction is used to avoid compliance with a federal law, the use of that legal fiction by the public agency required to comply with that law is an act of law breaking. *See* 42 U.S.C. § 4332(C). PEER's position on this matter is that the Commission now has real, rather than constructive, notice that an adverse impact or effect is about to take place and that a EA or EIS is required of the Commission prior to the damage occurring.

It is not clearly where ARCOS-1 standard of "irreparable" harm comes from — perhaps from the injunctive nature of this proceeding — but PEER requests only that the NEPA be complied with in as much as that statute requires assessment before adverse, rather than irreparable, harm be forced on the coral reef ecosystem off the coast of Florida. In this context, it does not matter that ARCOS-1 has been working with the State of Florida on these matters. NEPA review must be conducted independently, by each federal agency about to take a major federal action. 40 C.F.R. § 1507.2.

3. All necessary environmental review. Regarding ARCOS-1's allegation that they complied with all necessary environmental review and are in the process or obtaining all necessary environmental authorizations at the federal level, PEER politely disagrees. Motion in Opposition at 2, 5. It is true that ARCOS-1 has complied with applicable streamlined processes drafted to ensure the United States Army Corps of Engineers ("USACE") complies with NEPA. Likewise, they have been engaged in active negotiations and filings with the State of Florida Department of Environmental Protection ("FDEP"). But nowhere in the record does ARCOS-1 present the proof

that the State of Florida has lawful approval to act as surrogate for the USACE in assisting the latter to meet its NEPA requirements. Nor is their evidence on the record that environmental compliance by the USACE is thorough enough to allow the FCC to meets its NEPA requirements. *See* 40 C.F.R. § 1506.2(a)(b). Indeed, it is ARCOS-1 admission that its project will cause and environmental effect which triggers the FCC requirements under the Commission's rules. Motion of Opposition at 7-9; 47 C.F.R. § 1.1305. And as for ARCOS-1's further admission of effect on page eight (8) of its pleading, this is precisely the type of material the Commission staff is required to collect through the EA process, from not only ARCOS-1 but also from the environmental community. Motion of Opposition at 8. *See* 40 C.F.R. §§ 1506.6(a)(c); 1508.7; 1508.8. Where, in this now near complete process, has the Federal Communications Commission met its required, statutory review of the amount of damage caused to the coral reefs? 40 C.F.R. §§ 1500.1(b); 1508.14; 1508.18 Or, indeed, where is the required review of the appropriateness and effectiveness of mitigation plans? Are artificial reefs an acceptable alternative, and why is this so? Hopefully this is not so merely because the applicant has simply alleged as much after being subject to a *Request for an Emergency Administrative Injunction*!

Respectfully submitted,

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February 18, 2001

Environmental Law Clerks, 2000-2001

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